IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS' TIME BARRED CLAIMS AND INTEGRATED BRIEF IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

SECONDARY SOURCES

INTRODUCTION

Defendants respectfully move for partial summary judgment as to several of Plaintiffs' claims for liability and damages, which are time-barred. Plaintiffs allege that the land application of poultry litter causes various environmental injuries in the State of Oklahoma. While Defendants vigorously dispute Plaintiffs' purported "scientific" evidence, Plaintiffs' essential allegation is nothing new. Rather, the State of Oklahoma has been aware of similar assertions for decades. Statutes of limitation curtail the specter of suits or the awarding of damages based on long-stale claims, whether by private or governmental litigants. Accordingly, Plaintiffs' attempt to recover for alleged injuries based on conduct that occurred years—or even decades—ago must be rejected. Second, partial summary judgment is also appropriate with regard to Plaintiffs' claims arising under recently-enacted state statutory and regulatory laws. It is hornbook law that absent a clear indication to the contrary, newly adopted laws apply prospectively only. Plaintiffs' efforts to recover for conduct long predating such enactments are similarly time-barred.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The allegation that the waters in the Illinois River Watershed (IRW) accelerated eutrophication as a result of non-point source phosphorus loads from the Arkansas portion of the IRW, including contributions from poultry litter, has been made by some Oklahoma state officials since as early as 1983.

2. In April 1983, Oklahoma Governor George Nigh drafted a letter to Arkansas Governor Bill Clinton, stating that "[i]n the past few years significant deterioration in the quality of the [Illinois] River has occurred." Ex. 1 at 1 (Draft Ltr. from Governor George Nigh, State of Oklahoma, to Governor Bill Clinton, State of Arkansas (Apr. 22, 1983) (OWRB-021-0000537 – OWRB-021-000539)). He observed that "[t]he river is becoming so green that the bottom of the

river cannot be seen in most locations," and that the upper areas of Lake Tenkiller were "starting to show signs that are characteristic of an accelerated rate of eutrophication." *Id.* at 2. He represented that state agencies, including the Oklahoma Scenic Rivers Commission (OSRC), the Departments of Health, Agriculture, and Pollution Control, and the Attorney General, "have been studying the problem and making recommendations." *Id.* at 1.

3. In 1985, Governor Nigh created the Technical Advisory Force for the Illinois River "to provide [his] office timely and thorough technical review and advice" throughout the course of a "basinwide study of the Illinois River" initiated by Oklahoma and Arkansas, in conjunction with the United States Environmental Protection Agency (EPA). Ex. 2 at 1 (Proclamation (1985) (OSE-026-00001539 – OSE-026-00001540)). In creating this task force, Governor Nigh noted that "many people have concluded that the Illinois River is currently experiencing continuing degradation of aesthetic character and water quality." *Id.*

4. On March 23, 1988, the Oklahoma Department of Pollution Control received a study focusing on water quality factors that directly or indirectly influence water clarity in the Illinois River basin, which concluded that both Lake Frances and Lake Tenkiller were eutrophic. Ex. 3 at 3, 76, 78 (Gakstatter, J. H., and A. Katko, *An Intensive Survey of the Illinois River (Oklahoma and Arkansas) in August 1985* (Nov. 1986)). The study noted that "[i]n the upper Illinois River Basin, wastes from extensive confined poultry and animal production operations are disposed of by spreading them on the land, a practice that has produced excellent ground cover and pasture. These animal wastes, however, are rich in nitrogen and phosphorus and are suspected of contributing to nutrient levels in surface waters through soil percolation and direct runoff." *Id.* at 59. Based on the sampling conducted, the study linked high nitrogen levels in

groundwater with "animal waste applications," but noted that the data "strongly suggest that groundwater is not a transport mechanism for phosphorus in the Illinois River Basin." *Id*.

5. In June 1991, Oklahoma Governor David Walters activated an Illinois River Task Force created by Governor Nigh. Ex. 4 at 1 (Oklahoma Department of Pollution Control, *Governor's Illinois River Task Force Meets in Tahlequa*h, Press Release (Feb. 28, 1992) (OCC-065-0000543 – OCC-065-0000544)). The Task Force directed a sub-committee to "compile, expand, and update a research directory which would provide a listing of all research studies and data collected in the Illinois River Basin within the last fifteen years," which upon its completion would be made available through the Department of Pollution Control. *Id*.

6. In August 1991, Oklahoma State University published a report entitled *Cooperative Report on Evaluation and Assessment of Factors Affecting Water Quality of the Illinois River in Arkansas and Oklahoma*. Ex. 5 (Burks, Sterling L., *et al.*, *Cooperative Report on Evaluation and Assessment of Factors Affecting Water Quality of the Illinois River in Arkansas and Oklahoma*, *Final Draft* (Aug. 1991) ("*Cooperative Report*") (OCC-100-0000319 – OCC-100-0000630)). The *Cooperative Report* concluded that phosphorus and nitrogen concentrations were contributing to a decrease in water quality in the IRW, *id*. at 132-52, and identified "application of animal wastes to pastures adjacent to streams" as among the likely sources of nutrients, *id*. at 129.

7. In February 1992, following the resolution of *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the governors of Oklahoma and Arkansas created a joint task force to study interstate water quality challenges. The creation of this task force was formalized in the Joint Agreement of the Governors of the States of Arkansas and Oklahoma, executed on February 8, 1992. Ex. 6 (Joint Agreement of the Governors of the States of Arkansas and Oklahoma (Feb. 8, 1992)

(OSRC-043-0001677)). The joint task force identified nonpoint source run-off, water quality standards, and agri-business waste regulation, particularly from chicken and hog raising operations, as common areas of environmental concern. Ex. 7 at 2-3 (Arkansas/Oklahoma Environmental Task Force, *1992 Report of Annual Recommendations of the Arkansas/Oklahoma Environmental Task Force to Governor Clinton and Governor Walters* (1992) (OWRB-033-0001248 – OWRB-033-0001255)).

8. In August 1992, Professor Ray R. West, Department of Agronomy at Oklahoma State University (OSU), published a study that analyzed the rise in poultry production in Eastern Oklahoma and the standard practice of applying poultry litter to pasture and cropland. Ex. 8 (West, Ray R., *Risk to Water Quality/Soils of Eastern Oklahoma: Percolate Concentrations of Nitrogen and Phosphorus in Poultry Litter-Applied-Soils of Eastern Oklahoma* (Aug. 1992)). The study concluded that "[s]urface-applied poultry litter can contribute to increased amounts of nitrogen and phosphorous in percolates from soils of eastern Oklahoma. Soil percolates will eventually contribute to stream and lake quality." *Id.* at 1. The study made findings specific to the IRW, and noted that "poultry manure percolate is suspected to cause degradation of water quality in the Illinois River and consequently Tenkiller Ferry Lake." *Id.* at 3.

9. The claim that poultry litter has sometimes been applied in the IRW at rates exceeding the agronomic phosphorus requirements for plants, and concerns about the potential environmental impact from those applications, was known to Oklahoma state officials since at least 1995. In July 1995, OSU published *Effects of Rainfall, Slope, and Vegetation Height on Runoff Water Quality From Fescue Plots Treated with Poultry Litter*, which discussed the phosphorous content of poultry litter and the possibility that applying litter to satisfy nitrogen needs could result in more phosphorous than necessary for plant growth, which in turn has the

potential to reach rivers and streams. Ex. 9 at 1-2 (Olson, Clinton Harrison, *Effects of Rainfall, Slope, and Vegetation Height on Runoff Water Quality From Fescue Plots Treated with Poultry Litter* (July 1995) (OCC-075-0000133 – OCC-075-0000141)). The Oklahoma Conservation Commission (OCC), a state agency responsible for Oklahoma's natural resources, received this report and produced it during discovery in this litigation. *Id.* at 1.

10. In April 1997, Oklahoma Governor Frank Keating issued Executive Order No. 97-07, organizing the Governor's Animal Waste and Water Quality Protection Task Force. Ex. 10 (OK Exec. Order No. 97-07 (April 15, 1997) (OSE-011-0001418 – OSE-011-0001420)). The purpose of the Task Force was to "examine the current and past use, marketing, and disposal of poultry, swine and bovine waste and its effect on the quality of Oklahoma's water supply," *id.* at 2, in order "to develop recommendations for Governor Keating to ensure the protection of Oklahoma's water supply from the State's burgeoning confined animal production industry," Ex. 11 at 3 (Office of the Secretary of Environment, *Governor Frank Keating's Animal Waste and Water Quality Protection Task Force, Final Report* (Dec. 1, 1997)). With respect to poultry litter, the Task Force recommended that "new legislation should be drafted to ensure that dry litter poultry operations take extra precautions to control nutrient runoff from the land application of dry litter." *Id.* at 3.

11. The Oklahoma legislature in 1998 enacted comprehensive legislation to "allow for the monitoring of poultry waste application to land or removal from these operations and assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma." Okla. Admin. Code § 35:17-5-1 (effective June 25, 1998).

a. The Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. §§ 10-9.1, *et seq.* (effective July 1, 1998), requires poultry farmers producing more than ten

tons of poultry manure per year and confining birds for 45 days or longer in any 12-month period to register their operation with the Board of Agriculture. 2 Okla. Stat. § 10-9.1(B)(20), 10-9.3. Further, operators of a registered poultry feeding operation are required to develop an approved Animal Waste Management Plan, maintain records of poultry litter removed from and applied to their property, and complete mandatory education on waste management. 2 Okla. Stat. § 10-9.7. Pursuant to and in conjunction with the Oklahoma Registered Poultry Feeding Operations Act, the Oklahoma legislature incorporated rules in the Oklahoma Administrative Code "to control nonpoint source runoff and discharges from poultry waste application of poultry feeding operations." Okla. Admin. Code § 35:7-5-1, *et seq.* (effective June 25, 1998).

b. The Oklahoma Poultry Waste Transfer Act, 2 Okla. Stat. § 10-9.13, *et seq.* (effective July 1, 1998), tasks the Department of Agriculture to develop a plan to regulate the transfer of poultry waste in order "to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient-vulnerable groundwater as designated in the most recent Oklahoma's Water Quality Standards." 2 Okla. Stat. § 10-9.13.

c. The Oklahoma Poultry Waste Applicators Certification Act, 2 Okla. Stat. § 10-9.16, *et seq.* (effective July 1, 1998), requires persons who wish to land apply poultry litter to obtain a state certification, and to file an annual report regarding poultry litter applied during the previous year. 2 Okla. Stat. §§ 10-9.17, 9.18. Further, all certified applicators of poultry litter must obtain the most recent soil and poultry waste tests prior to any land application and comply with any applicable animal waste management plan or conservation plan. 2 Okla. Stat. §§ 10-9.19.

12. The laws passed by the Oklahoma General Assembly in 1998 recognize that poultry litter, if not properly managed, can contribute significantly to nutrient loading. The legislature concluded that these laws adequately regulate the use of litter, and therefore authorized the continued use of poultry litter as fertilizer for soils that contain sufficient phosphorus to meet crop requirements, but which can benefit from the other valuable nutrients and organic material found in poultry litter.

13. Oklahoma Attorney General Drew Edmondson claims to have been in active negotiation with the Defendants about poultry litter use and alleged environmental injuries as early as November 2001.[1]

14. During or prior to 2002, OSU, OCC, and the Oklahoma Department of Agriculture, Food and Forestry (ODAFF) created the "Oklahoma Litter Market" website to assist farmers in using poultry litter as fertilizer, and to "serve[] as a communication link for buyers, sellers and service providers of poultry litter."[2] The Oklahoma Litter Market explains that "the litter can be utilized as a fertilizer for pastureland, cropland and hay production."[3]

15. Plaintiffs filed the Original Complaint in this action on June 13, 2005. *See* Complaint, Dkt. Nos. 1-2 (June 13, 2005).

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[1] *See*, *e.g.*, Remarks of Oklahoma Attorney General Drew Edmondson, United States Attorneys Office Symposium (Apr. 17, 2008) (available at www.youtube.com/watch?v=_nOV8jEQkaQ, last visited Feb. 20, 2009). Defendants dispute Attorney General Edmondson's description of the pre-litigation negotiations and in particular disagree with his oft-repeated claim that he made no monetary demands. However, that disagreement is immaterial to the issue before the Court in this motion—namely, when the Attorney General or other state officials knew of the facts giving rise to the claims asserted in this lawsuit. By Attorney General Edmondson's own admission, he knew of those facts and was actively negotiating with the Defendants as early as November 2001.

[2] Oklahoma Litter Market – Home (© 2002-2009) (available at http://www.ok-littermarket.org/, last visited Feb. 20, 2009).

[3] Oklahoma Litter Market – About Litter (© 2002-2009) (available at http://www.ok-littermarket.org/what_is_poultry_litter.asp, last visited Feb. 20, 2009).

LEGAL STANDARD

"Summary judgment . . . is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is entitled to summary judgment as a matter of law where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Where the movant shows the "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (requiring non-moving party to provide admissible evidence "on which a jury could reasonably find for the plaintiff"); *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 586 (1986) ("[plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts"). Sufficiency of the evidence will turn on whether it presents a "disagreement [that] require[s] submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

ARGUMENT

I. SEVERAL OF PLAINTIFFS' FEDERAL AND STATE CLAIMS AS TO LIABILITY AND DAMAGES ARE BARRED IN WHOLE OR IN PART BY THE APPLICABLE STATUTE OF LIMITATIONS

Plaintiffs' claims for: (1) natural resource injuries under CERCLA; (2) federal common law nuisance; (3) state law theories of private nuisance and trespass; and (4) state law claims

seeking to recover damages arising out of private rather than public rights, are time barred in whole or in part by the applicable statute of limitations.

A. CERCLA – Natural Resource Damages (Count 2)

CERCLA natural resource damages claims are subject to a three-year statute of limitations. *See* 42 U.S.C. § 9613(g)(1). Specifically, "no action may be commenced for [natural resource] damages . . . unless that action is commenced within 3 years after [t]he date of the discovery of the loss and its connection with the release in question." *Id.* § 9613(g)(1)(A). This statute of limitations applies equally to governmental and non-governmental suits. *See United States v. Montrose Chem. Corp. of Cal.*, 883 F. Supp. 1396, 1403 (C.D. Cal. 1995), *rev'd on other grounds*, 104 F.3d 1507 (9th Cir. 1997).

CERCLA's statute of limitations applies to the extent that "Plaintiffs had knowledge of the [asserted] releases, of the loss of resources alleged and the [claimed] connection between the releases and the loss." *Montrose*, 883 F. Supp. at 1403. Such knowledge may be actual or constructive: the discovery period begins to run when a plaintiff actually knew or "reasonably should have known" that the loss occurred. 42 U.S.C. § 9658(b)(4)(A); *see also Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004). Moreover, with a governmental plaintiff the relevant information need not be held by a single individual. Rather, it is enough that "sufficient employees within the governmental agencies with a duty to transmit the necessary information possessed the relevant knowledge prior to" the date in question. *Montrose*, 883 F. Supp. at 1405.

The undisputed facts above demonstrate that Plaintiffs failed to file suit within three years of "[t]he date of the discovery of the [alleged] loss and its [alleged] connection with the release in question." 42 U.S.C. § 9613(g)(1)(A). The State of Oklahoma was aware of the allegations it makes in its Complaint well before June 13, 2002. First, Plaintiffs have long known of the use of land-applied poultry litter as a fertilizer. Indeed, the State of Oklahoma has

actively regulated and promoted the practice for more than a decade. *See, e.g.*, Undisputed Facts ¶¶ 11-12, 14. Second, Plaintiffs have been aware of the assertion that the application of poultry litter causes a "loss of resources" in the IRW for at least 25 years. *See, e.g.*, Undisputed Facts ¶¶ 1-13. During that time the State of Oklahoma—often in conjunction with the State of Arkansas and EPA—has repeatedly investigated and addressed the issue through task forces, studies and policy initiatives, and through the enactment of legislation and regulations intended to curtail the alleged injuries. *See, e.g.*, Undisputed Facts ¶¶ 1-12. During this same period the application of poultry litter as a fertilizer and its potential impact on water quality in the IRW has been a topic of extensive academic research and analysis. *See, e.g.*, Undisputed Facts ¶¶ 6, 8-9. Plaintiffs' own actions and allegations confirm their longstanding knowledge of this conduct and alleged loss. *See, e.g.*, Undisputed Fact ¶ 13; Second Amended Complaint, Dkt. No. 1215 at ¶¶ 64-66 (July 16, 2007). Yet, Plaintiffs have pointed to nothing new to justify their delay in pressing this suit. Instead, they merely restate well-worn allegations with respect to the purported connection between the 'releases' or 'threatened releases' in question and the alleged 'loss of natural resources.'

Because "no action may be commenced" to recover damages for such losses after the running of the three-year statute of limitations, Plaintiffs' CERCLA natural resource damages claim is time-barred. *See Montrose*, 883 F. Supp. at 1403-07 (dismissing claim where Plaintiffs failed to satisfy the discovery prong of § 9613(g)(1)). Summary judgment in Defendants' favor is therefore appropriate as to Count 2.

B. Federal Common Law Nuisance (Count 5)

Plaintiffs' federal common law nuisance claim in Count 5 is similarly time-barred because it was filed more than two years after Plaintiffs learned of the essential facts they assert in support of it. Plaintiffs claim both permanent and temporary damages. Yet, Plaintiffs have

not identified any specific damages suffered within the statutory period. As a result of Plaintiffs' delay, Plaintiffs' claims for damages under Count 5 must be dismissed in their entirety.

Federal law does not specify a limitations period for common law nuisance claims, and therefore borrows the most analogous state limitations period. *See Jones v. R.R. Donnelley & Sons, Co.*, 541 U.S. 369, 377-78 (2004); 1-3 MOORE'S MANUAL--FEDERAL PRACTICE AND PROCEDURE § 3.05(2)(a) (2008). Here, the most analogous rule is Oklahoma's two-year statute of limitations for state statutory and common law nuisance. *See Moneypenney v. Dawson*, 141 P.3d 549, 554 (Okla. 2006). This period governs Plaintiffs' federal common law claim.

1. The Two Year Statute of Limitations on Federal Nuisance Applies to the State

Federal law borrows the analogous state law time period and associated tolling rules, unless those rules are inconsistent with the federal law or the policy animating it. *See Bd. of Regents v. Tomanio*, 446 U.S. 478, 484-85 (1980); *Baker v. Bd. of Regents*, 991 F.2d 628, 632-33 (10th Cir. 1993). Further, federal law borrows only so much as is necessary to fill the interstices in federal law, and does not carry along related but distinct doctrines. *See West v. Conrail*, 481 U.S. 35, 39-40 (1987); *Moore v. Liberty Nat. Life Ins. Co.*, 267 F.3d 1209, 1216-17 (11th Cir. 2001) (federal courts borrow "only the length of the state's … statute of limitations" but not "distinct state limitations period[s], such as a rule of repose"). Therefore, whereas the principle of *nullum tempus occurrit regi*—that time does not run against the king—may apply in state court under state causes of action, *see Oklahoma City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 133 (Okla. 1988), as explained below, it has no applicability in federal court under a federal cause of action.

Instead, where a state elects to litigate in federal court under federal law, it is a litigant like any other. "By voluntarily appearing in the role of suitor it abandons its immunity from suit

and subjects itself to the procedure and rules of decision governing the forum which it has sought." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) (rejecting claim by foreign government plaintiff that it was immune from statute of limitations). By joining suit in a court and under a law not its own, "[e]ven the domestic sovereign … accepts whatever liabilities the court may decide to be a reasonable incident of that act." *Id*. Federal law would apply the two-year statute of limitations to any other litigant alleging federal common law nuisance. Whereas a state may exempt itself from application of its own laws in its own courts, it may not use a state law device to expand its rights under substantive federal law in federal court. Hence, state law provides the relevant limitations period, but does not authorize Plaintiffs to escape application of that period to their substantive federal claim.

2. Plaintiffs Have Failed to Adduce Proof of Injury or Damages Caused by Defendants Within the Two Year Statute of Limitations

Plaintiffs' Count 5 common law nuisance claim asserts both temporary and permanent injuries. *See* SAC ¶ 113. Permanent injuries are those that are definite and complete; temporary damages, by contrast, are "ongoing" in nature and are abatable. *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985); *see Moneypenney*, 141 P.3d at 553; *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1027 (10th Cir. 2007). For both types of injury, the statutory period begins to run "when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." *Alexander*, 382 F.3d at 1215.[4]

Plaintiffs nowhere distinguish which injuries are "permanent" and which injuries are "temporary." *See* SAC ¶ 113. To the extent that the injuries alleged in the Complaint are

[4] Oklahoma similarly tolls statutes of limitations only "until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury." *Resolution Trust Corp. v. Grant*, 901 P.2d 807, 813 (Okla. 1995); *Daugherty v. Farmers Coop. Ass'n*, 689 P.2d 947, 951 (Okla. 1984) ("A plaintiff is chargeable with knowledge of facts which he ought to have discovered in the exercise of reasonable diligence.").

permanent, however, it is indisputable that Plaintiffs knew of the alleged conduct and purported injuries that constitute the basis for this lawsuit long prior to the two-year statute of limitations period. *See* Undisputed Facts ¶¶ 1-15. Plaintiffs' claim for damages arising from any such alleged permanent injuries is therefore time-barred in its entirety because Plaintiffs failed to commence this lawsuit within two years from the time that the permanent nature of the injury "'became apparent to them, or would be apparent to a reasonable person under the same circumstances.'" *Moneypenney*, 141 P.3d at 554 (quoting *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 950 (Okla. 1957)). Summary judgment in Defendants' favor is thus appropriate as to Plaintiffs' claim for permanent federal nuisance.

Plaintiffs' claim for temporary or ongoing injuries is also time-barred. As noted, a "temporary nuisance" is one that is ongoing and abatable. *Briscoe*, 702 P.2d at 36. The statute of limitations applies to a temporary nuisance by treating each "alleged invasion" as a separate nuisance, "which 'gives rise over and over to [new] causes of action for damages sustained within the limitations period immediately prior to suit.'" *Burlington N.*, 505 F.3d at 1029 (quoting *Branch v. Mobil Oil Corp.*, 788 F. Supp. 531, 536 (W.D. Okla. 1991)). Thus, a temporary nuisance plaintiff may recover damages and abatement costs only as related to "injuries incurred within the two years immediately preceding the filing of the lawsuit." *Burlington N.*, 505 F.3d at 1028; *see Branch*, 788 F. Supp. at 536; *see also City of Bethany v. Muni. Sec. Co.*, 274 P.2d 363, 367 (Okla. 1954) ("A nuisance abatable by the expenditure of money and labor is a temporary nuisance and damages suffered therefrom are limited to the two years next preceding the filing of the suit if the statute of limitations, as here, was plead."); *Haenchen v. Sand Prods. Co.*, 626 P.2d 332, 334 (Okla. Civ. App. 1981) (holding that the

plaintiff "will not be barred in bringing his action but must limit proof of damages to the two years next preceding the filing thereof.")).

The Tenth Circuit's opinion in *Burlington Northern* is particularly instructive on this point. That case regarded a tar-like substance that had been flowing from the defendant's land onto the plaintiff's land since the 1970s. *See Burlington N.*, 505 F.3d at 1018. In 2001, the plaintiff constructed a berm to stem the flow and initiated cleanup and removal efforts; in 2003, the plaintiff filed suit to recover these costs. *See id.* at 1029. The Tenth Circuit held that the plaintiff was entitled to recover these abatement costs, but only insofar as they had been incurred within the two year statute of limitations. *See id.* Because the berm had been built within the two-year period, the plaintiff was entitled to recover those costs. *See id.* at 1018, 1029; *see also* Defs.-Appellees' Resp. to Appellant's Opening Br., Case Nos. 04-5182, 04-5190, 05-5137 (*Burlington N. & Santa Fe Ry. v. Grant*), 2006 WL 1786867, at **14, 52-59 (Feb. 7, 2006) (noting that the berm was built in June/July 2001, approximately one year and eight months prior to the filing of the suit in March 2003). With regard to removal costs, however, the Plaintiffs' recovery was much more limited. The Tenth Circuit made clear that the mere fact that the plaintiff undertook the removal effort within the two-year period preceding the filing of the complaint did not entitle the plaintiff to recover the full costs of removal: "To permit [plaintiff] to recover for the removal of all the [tar-like material] on its property would, in effect, negate the statute of limitations, as [plaintiff] would then be able to recover for decades of [tar-like material] migration." *Burlington N.*, 505 F.3d at 1029. Rather, Defendants could be held to pay for removal of only that portion of the tar-like substance that flowed across the property line during the two-year limitations period. *See id*. The Tenth Circuit was thus clear that with regard

to damages and abatement costs for a temporary nuisance, a plaintiff must "[meet] its burden of setting forth damages of its costs of restoration within the two-year limitations period." *Id*.

In this case, Plaintiffs' proffered evidence of damages falls well short of that required by *Burlington Northern*. Plaintiffs have served two lengthy reports from consultants purporting to calculate future and past damages totaling more than $600 million. *See* Ex. 12 (Chapman, David J., *et al., Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Tenkiller Lake*: Expert Report for State of Oklahoma (Jan. 5, 2009) ("Future Damages Report")); Ex. 13 (Hanemann, W. Michael, *et al., Natural Resource Damages Associated with Past Aesthetic and Ecosystem Injuries to Oklahoma's Illinois River System and Tenkiller Lake*: Expert Report for State of Oklahoma (Jan. 5, 2009) ("Past Damages Report")). Separately, Plaintiffs have served an expert report regarding purported remediation alternatives. *See* Ex. 14 (King, Todd W., *Identification and Evaluation of Viable Remediation Alternatives to address Injuries related to Land Disposal of Poultry Waste within the Illinois River Watershed*, Camp Dresser & McKee, Inc. (May 2008)). None of these documents, however, identifies specific instances of nuisance, specific damages, or specific abatement costs caused by Defendants' conduct during the two year limitations period.

Plaintiffs' Future Damages Report purports to measure damages attributable to future "aesthetic and ecosystem effects [in the IRW] resulting from excess phosphorus."[5] Ex. 12 at ES-1. Plaintiffs' developed this "monetary value on aesthetic and ecosystem injuries" through a "contingent valuation study." *Id.* at 1-6. In brief, Plaintiffs' consultants conducted a public opinion survey: after 'educating' respondents as to Plaintiffs' view of the condition of the IRW,

[5] Interestingly, although Plaintiffs' damages experts acknowledge the existence of "other sources" of phosphorous, Ex. 12 at ES-1, they make no effort to disaggregate damages attributable to particular sources.

Plaintiffs' interviewers asked respondents to place a value on a hypothetical remediation program designed to restore the IRW to its condition in 1960. *See generally id.* at 1-6 to 1-8.[6]

Putting aside the manifest deficiencies of basing a damages calculation on a public survey conducted in secret by one party, this study is insufficient to bring Plaintiffs' temporary nuisance claims within the statute of limitations because it fails to attribute any portion of the alleged damages to any particular time-frame. Rather, it measures alleged aesthetic and other damages based on purported phosphorus loading across the entire 48-year period from between 1960 to 2008. *See id.* at 1-6 to 1-8; *id.* at 4-6 to 4-13 (portion of survey where "respondents … learn[] how the lake has changed since around 1960"). Even assuming *arguendo* that Plaintiffs are correct that all or some of Defendants' conduct constitutes a temporary nuisance, the law is clear that each separate instance would constitute a separate nuisance carrying its own two-year limitations period. Because Plaintiffs' Future Damages Report makes no effort to identify what portion of the hundreds of millions of dollars it seeks are actually attributable to conduct that occurred within the two-year limitations period, it supplies no basis for Plaintiffs' Count 5 claims to avoid the statute of limitations.

Plaintiffs' Past Damages Report is similarly defective. It merely uses the results of the Future Damages Report, with minimal adjustments, to project the same types of aesthetic and ecosystem injuries retrospectively for 1981 through 2008. *See* Ex. 13 at 2-6 ("[W]e adapt the

[6] Despite the fact that Plaintiffs' own remediation expert rejected alum treatments as a viable remediation alternative on account of its negative impacts on crop growth and toxicity to aquatic life, *see* Ex. 14 at 12, 16, 19, Plaintiffs' damages survey informed respondents that the IRW could be remediated by treating soils and waters with alum, *see* Ex. 12 at 1-7, 4-16 to 4-23. And, as the Future Damages Report itself explains, responses supporting higher damages amounts correlated strongly to individual respondents' belief in the efficacy of the proposed alum-based remedial scheme that was described to them. *See* Ex. 12 at 6-7. Plaintiffs' damages estimate is thus based on a hypothetical remedial course that their own expert has rejected as unworkable.

estimate of average willingness-to-pay (WTP) per household in 2008 for reducing future injuries occurring after 2008, as reported in Chapman et al. (2009), in order to estimate the average WTP per household in 1980 for reducing injuries occurring between 1981 and 2008."). Again, overlooking for purposes of this motion the deficiencies in this study's underlying methods and calculations, it too fails to identify any recoverable damages incurred during the two-year period preceding the filing of this lawsuit and thus any recoverable abatement costs. In fact, the Past Damages Report admits that, given the chosen methodology's limitations, "[i]t is not possible to apportion … a separate value for the loss of services in any particular year." *Id.* at 2. Therefore, this report similarly fails to provide a sufficient basis for Plaintiffs to demonstrate that any such damages occurred within the two-year limitations period applicable to Count 5.

Third, Plaintiffs served an expert report by Todd King, an environmental engineer and colleague of Plaintiffs' Expert Dr. Roger Olsen's at the Camp, Dresser and McKee firm. Ex. 14. Mr. King's report purports to consider a variety of potential remedial alternatives for use in the IRW. *See id.* at 22-31. He proposes, for example, the use of vegetative buffer strips to remove nutrients, the drilling of new residential wells, and the upgrading of existing waste water treatment facilities. *See id.* He does not, however, associate any portion of any proposed costs for any proposed remediation alternative with any specific conduct of Defendants or injury suffered by Plaintiffs specifically during the two years prior to filing suit. Quite the contrary, as was the case in *Burlington Northern*, Mr. King's proposed remediation alternatives address the removal of decades worth of nutrients from a myriad of sources, without drawing any nexus to Defendants' conduct during the limitations period.

Plaintiffs have failed to identify any recoverable damages associated with any alleged temporary nuisance falling within the two year statute of limitations. *See Burlington N.*, 505

F.3d at 1029. Because Plaintiffs cannot recover for either permanent or temporary federal nuisance, summary judgment is appropriate in Defendants' favor as to Count 5.

C. State Law Claims for Private Nuisance and Trespass (Counts 4 and 6) and Claims on Behalf of Private Individuals (Counts 4 and 10)

Partial summary judgment is also appropriate for several of Plaintiffs' state law claims. Although Plaintiffs have insisted repeatedly that statutes of limitations do not run against the State,[7] such immunity extends only to claims under Oklahoma law seeking to vindicate *public* rights, not *private* rights. *See HTB*, 769 P.2d at 133-34 ("the nature of the right asserted depends upon 'whether the right is such as to affect the public generally or to merely affect a class of individuals within the political subdivision'") (quoting *Herndon v. Bd. of Comm'rs in and for Pontotoc County*, 11 P.2d 939, 941 (Okla. 1932)); *Bd. of County Comm'rs of Woodward County v. Willett*, 152 P. 365, 365 (Okla. 1915) (applying statute of limitations to state entity because the suit affected only private rights). Plaintiffs' state law claims for private nuisance and trespass, and for all claims raised on behalf of private individuals, are therefore also time-barred.

1. State Law Private Nuisance

Plaintiffs allege both public and private nuisance under Oklahoma state law in Count 4. *See* SAC ¶ 100. By definition, private nuisance claims are subject to a two-year statute of limitations, even when asserted by the government. *See Moneypenney*, 141 P.3d at 554.[8]

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[7] *See, e.g.*, Pls.' Resp. to Mot. to Compel, Dkt. No. 1086 at 16 n.2 (Mar. 19, 2007) ("neither any statute of limitations nor any defense of estoppel applies to the State").

[8] Oklahoma law defines a public nuisance as one that "affects at the same time an entire community…or any considerable number of persons." 50 Okla. Stat. § 2. Private nuisance, by contrast, is defined residually as encompassing every nuisance that is not a public nuisance. 50 Okla. Stat. § 3 ("Every nuisance not included in the definition of [public nuisance] is private."). By definition, the State's effort to recover for private nuisance cannot be an effort to vindicate public rights, and is not shielded from the statute of limitations. *See HTB*, 769 P.2d at 133-34.

As noted above, the statute of limitations runs once "the injured party knows or, in the exercise of reasonable diligence, should have known of the injury." *Resolution Trust*, 901 P.2d at 813; *see Daugherty*, 689 P.2d at 951 ("A plaintiff is chargeable with knowledge of facts which he ought to have discovered in the exercise of reasonable diligence."). Here, Plaintiffs have long known of Defendants' conduct and the alleged injuries that form the basis for the private nuisance claim. *See* Undisputed Facts ¶¶ 1-15. Therefore, Plaintiffs' claim for permanent injuries under a theory of state law private nuisance is barred in its entirety, and their claim for temporary injuries arising from state law private nuisance is barred, at a minimum, as to any conduct which occurred more than two years before this suit began. *See supra* at 12-15. But, because Plaintiffs failed to present any evidence of recoverable damages they sustained during this limitations period, the Court should dismiss the claim for temporary injuries in its entirety. *See supra* at 15-18. Summary Judgment in Defendants' favor is therefore appropriate as to Plaintiffs' claim in Count 4 for private nuisance under Oklahoma law.

2. State Law Trespass

Plaintiffs' claim in Count 6 for state law trespass is also subject to a two-year statute of limitations. *See* 12 Okla. Stat. § 95(3). Plaintiffs cannot assert immunity from this limitations period because a claim in trespass arises entirely from private, not public rights. As Plaintiffs have already admitted, the State is "not seeking to press [its] trespass claim in its *parens patriae* capacity." Resp. to Mot. for Partial Judgment as a Matter of Law Based on Pls.' Lack of Standing, Dkt. No. 1111 at 17 (Mar. 30, 2007). Instead, Plaintiffs' claim rests solely on the State's possessory interest in government property, in a manner identical to any private litigant. *See id*. Because Plaintiffs are acting solely to protect the State's own property, and not to vindicate any broader public right, they are not immune from the statute of limitations. *See HTB*, 769 P.2d at 133.

Plaintiffs seek to recover both permanent and temporary damages for the trespass claim. *See* SAC ¶ 122. Once again, the record demonstrates convincingly that Plaintiffs' possessed actual knowledge of the purported conduct and injury long before filing the present lawsuit. *See* Undisputed Facts ¶¶ 1-15. As a result, the law bars any claim for permanent injuries,[9] and requires claims for temporary injuries to be dismissed except to the extent that they are proven to have arisen during the statutory period.[10] *See supra* at 12-15. Because Plaintiffs have presented no evidence identifying any recoverable damages incurred during this limitations period, *supra* at 15-18, summary judgment in Defendants' favor is appropriate as to Count 6 in its entirety.

3. State Law Claims on Behalf of Private Individuals

Finally, Plaintiffs are also barred from asserting immunity to the statutes of limitations applicable to any claim Plaintiffs assert on behalf of any private individual, landowner or entity. With the exception of state law trespass, Plaintiffs' state common law claims, Counts 4 and 10, assert claims both on behalf of the State and also as the unsolicited representative of a host of private individuals. *See* Pls.' Resp. to Defs.' Mot. to Dismiss Count 6 of Second Amended Complaint, Dkt. No. 1255 at 2 n.1 (Sept. 4, 2007) ("For purposes of claims in this action other than its trespass claim the State does of course assert a broader parens patriae / quasi-sovereign interest in all waters located within the Oklahoma portion of the Illinois River Watershed.");

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[9] *See, e.g.*, *Burlington N. & Santa Fe Ry. v. Grant*, 2004 U.S. Dist. LEXIS 30999, *18-19 (N.D. Okla. Oct. 5, 2004) (dismissing "permanent-damages action under trespass" where "Plaintiff was certainly aware of the trespass damages . . . two years before this action was filed"). The Tenth Circuit did not consider the district court's dismissal of the trespass action in the appeal discussed *supra*. *See supra* at 14-15; *Burlington N.*, 505 F.3d 1013.

[10] *See United States v. Hess*, 194 F.3d 1164, 1177 (10th Cir. 1999) ("In trespass cases, where the statute of limitations has expired with respect to the original trespass, but the trespass is continuing, we and other courts have calculated the limitation period back from the time the complaint was filed.").

SAC ¶ 5 ("The State of Oklahoma … brings this action on its own behalf and as parens patriae on behalf of the residents of Oklahoma."); *see also, e.g.*, *id.* at ¶¶ 98-99, 109-112.

Count 4 (public and private nuisance) is subject to a two-year limitations period. *See Moneypenney*, 141 P.3d at 554. Count 10, alleging unjust enrichment / restitution / disgorgement, is subject to a three-year limitation period. *See Sholer v. State ex rel. Dept. of Public Safety*, 945 P.2d 469, 475 (Okla. 1995) (applying three-year statute of limitations for unjust enrichment claims). Any residual state law claim addressing the rights of private individuals is subject to a five-year limitation period. *See* 12 Okla. Stat. § 95(12) (residual five-year limitation period for "[a]n action for relief, not hereinbefore provided for"). Oklahoma statutes of limitations fully apply to the State when it seeks to vindicate private rights. *See HTB*, 769 P.2d at 133-34. Because Plaintiffs' state common law claims seek to vindicate private rights, the relevant statutes of limitations apply in this case. *See id.* at 133.

The record above demonstrates conclusively that Plaintiffs were aware of the allegations in their Complaint well before the longest applicable statutory period. *See* Undisputed Facts ¶¶ 1-15. Moreover, as discussed above, Plaintiffs have failed to demonstrate any specific injuries attributable to Defendants' conduct and incurred within any of the applicable statutes of limitations. *See supra* at 12-18. Plaintiffs' claims for permanent injuries to private individuals under these counts must be dismissed in their entirety and claims for temporary injuries to private individuals must, at a minimum, be limited to injuries that occurred within the applicable statutory period. *See supra* at 12-15, 19-20. Further, because Plaintiffs have failed to provide any evidence identifying the amount of damages incurred by private individuals during the limitations period, the Court should dismiss the claims for temporary injuries outright. *See supra*

at 15-18. Summary judgment in Defendants' favor is appropriate as to Counts 4 and 10 to the extent that they seek to recover for injuries to private rights.

Because the claims are time-barred under the applicable statutes of limitations, summary judgment in Defendants' favor is appropriate as to Counts 2, 5, and 6 in their entirety, Count 4 to the extent it seeks to recover for private nuisance, and Counts 4 and 10 to the extent they seek to recover for private rights.

II. PLAINTIFFS' STATE LAW STATUTORY CLAIMS ARE LIMITED BY THE ENACTMENT DATE OF THE STATUTES.

Plaintiffs have alleged, without limitation, that "each instance" of Defendants' conduct constitutes a violation of 27A Okla. Stat. § 2-6-105 & 2 Okla. Stat. § 2-18.1 (Count 7), 2 Okla. Stat. § 10-9.7 & Okla. Admin. Code § 35:17-5-5 (Count 8), and Okla. Admin. Code § 35:17-3-14 (Count 9). *See* SAC ¶¶ 127-138. Plaintiffs' allegations are, however, impermissibly overbroad, because these Oklahoma statutes and administrative regulations at issue do not apply retroactively to conduct that occurred before they took effect. Defendants are therefore entitled to partial summary judgment as to allegations set forth in Counts 7, 8, and 9 to the extent that they allege conduct that pre-dates the enactment of the applicable laws and regulations.[11]

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[11] With respect to alleged violations of the Oklahoma Environmental Quality Code, 27A Okla. Stat. § 2-6-105, and the Oklahoma Agricultural Code, 2 Okla. Stat. § 2-18.1 (Count 7), the complained of conduct must be limited, at a minimum, to that which occurred *after* July 1, 1993 and April 6, 2004, respectively. *See* 27A Okla. Stat. § 2-6-105 ("Added by Laws 1993, c.145, § 60, eff. July 1, 1993"); 2 Okla. Stat. § 2-18.1 ("Added by Laws 2004, c. 60, § 5, emerg. eff. April 6, 2004").

With respect to alleged violations of the Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9.7 and the Animal Waste Management Plan, Okla. Admin. Code § 35:17-5.5 (Count 8), the complained of conduct must be limited, at a minimum, to that which occurred *after* July 1, 1998 and June 25, 1998, respectively. *See* 2 Okla. Stat. § 10-9.7 ("Added by Laws 1998, c. 232, § 7, eff. July 1, 1998"); Okla. Admin. Code § 35:17-5-5 ("Added at 15 Ok Reg 1057, eff 12-19-97 (emergency); Added at 15 Ok Reg 2508, eff 6-25-98").

With respect to alleged violations of the Oklahoma Concentrated Feeding Operations Act, Okla. Admin. Code § 35:17-3-14 (Count 9), the complained of conduct must be limited, at a

It is hornbook law that newly-enacted statutes and regulations apply only prospectively, unless the legislature clearly and unambiguously expresses its intent to apply the new rules retroactively. This is a principle of both federal and Oklahoma law. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *Black v. M & W Gear Co.*, 269 F.3d 1220, 1228 n.3 (10th Cir. 2001) (quoting *Landgraf*, 511 U.S. at 280) ("The presumption against retroactive application of a statute applies 'absent clear congressional intent favoring' retroactive application of the new statute."); *Wickham v. Gulf Oil Corp.*, 623 P.2d 613, 615-616 (Okla. 1981) ("[S]tatutes are generally presumed to operate prospectively [unless] the purposes and intention of the Legislature to give a statute a retrospective effect are expressly declared or are necessarily implied from the language used." (internal citations omitted)). Nothing in the state statutes and regulations cited in Counts 7 through 9 provides any suggestion that the statutes or regulations were intended to apply retroactively. Plaintiffs' claims must be dismissed to the extent they complain of conduct that preceded the enactment of the laws and regulations.[12]

CONCLUSION

For the foregoing reasons, Defendants respectfully move the Court for an order of partial summary judgment dismissing Plaintiffs' time barred claims.

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minimum, to that which occurred *after* June 25, 1998. *See* Okla. Admin. Code § 35:17-3.14 ("Added at 15 Ok Reg 102, eff 10-13-97 (emergency); Added at 15 Ok Reg 2508, eff 6-25-98").

[12] In addition, any imposition of statutory civil penalties for past conduct that was lawful at the time it occurred would raise serious *ex post facto* questions. *See Landgraf*, 511 U.S. at 267-68. Defendants reserve the right to raise such issues at a later date as necessary.

Respectfully submitted,

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